

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA,

4 v.

17 CR 127 (KMW) (BCM)

5 STEVEN SIMMONS,

6 Defendant.

7 -----x

8 New York, N.Y.
9 October 30, 2017
10:40 a.m.

10 Before:

11 HON. BARBARA C. MOSES,

12 Magistrate Judge

13
14 APPEARANCES

15 JOON H. KIM
16 Acting United States Attorney for the
17 Southern District of New York
18 BRENDAN FRANCIS QUIGLEY
19 Assistant United States Attorney

20 MIEDEL & MYSLIWIEC
21 Attorneys for Defendant
22 BY: FLORIAN MIEDEL
23
24
25

1 (Case called)

2 THE DEPUTY CLERK: Counsel, state your name for the
3 record.

4 MR. QUIGLEY: Good morning, your Honor. Brendan
5 Quigley for the United States, joined by Special Agent Mike
6 Savona of the FBI.

7 THE COURT: Good morning.

8 MR. MIEDEL: Good morning. Frank Miedel for
9 Mr. Simmons.

10 THE COURT: Good morning, Mr. Miedel.

11 Good morning, Mr. Simmons.

12 THE DEFENDANT: Good morning.

13 THE COURT: I understand we are here for a change of
14 plea.

15 Mr. Miedel, I understand Mr. Simmons, having
16 previously pleaded not guilty, is now prepared to plead guilty
17 to Count One of the superseding indictment. Is that correct?

18 MR. MIEDEL: That is correct.

19 THE COURT: Mr. Simmons, I'm Magistrate Judge Moses.
20 I have before me a document entitled Consent to Proceed Before
21 a United States Magistrate Judge on a Felony Plea Allocution.
22 This appears to be your signature down at the bottom.

23 Did you sign that form?

24 THE DEFENDANT: Yes, your Honor.

25 THE COURT: What this form says is that you know you

1 have the right to have your plea taken by a United States
2 district judge, but you're agreeing to have your plea taken by
3 a magistrate judge, which is what I am.

4 As a magistrate judge, I have the authority to take
5 your plea with your consent. You are entitled to all the same
6 rights and protections as if you were before a district judge,
7 and if you are found guilty, you'll be sentenced by a district
8 judge.

9 So, before you signed the consent form, did your
10 attorney explain that to you?

11 THE DEFENDANT: Yes, your Honor.

12 THE COURT: Do you wish to proceed with your plea in
13 my courtroom today?

14 THE DEFENDANT: Yes, your Honor.

15 THE COURT: Very well. I will accept your consent.
16 As I discussed with your attorney, sir, I have been informed
17 that you wish to change your plea and enter a plea of guilty as
18 to the charges alleged against you in Count One of the
19 superseding indictment.

20 Is that correct?

21 THE DEFENDANT: Yes, your Honor.

22 THE COURT: Now, before deciding whether to accept
23 your guilty plea, I need to ask you certain questions. It's
24 important that you answer my questions honestly and completely.

25 The purpose of these proceedings is to make sure that

1 you understand your rights, to make sure that you are pleading
2 guilty of your own free will, and to make sure that you're
3 pleading guilty because you are guilty and not for some other
4 reason.

5 Do you understand what I'm saying?

6 THE DEFENDANT: Yes, your Honor.

7 THE COURT: If you don't understand any question I ask
8 you or if you want at any time to consult with your attorney,
9 please let me know, and I will give you the time to do so,
10 because it is important that you understand every question
11 before you answer it.

12 I will ask Mr. Snell, my courtroom deputy, to swear
13 the defendant.

14 (Defendant sworn)

15 THE COURT: Mr. Simmons, you're now under oath.

16 Do you understand that if you answer any of my
17 questions falsely, you could be prosecuted for perjury?

18 THE DEFENDANT: Yes, your Honor.

19 THE COURT: Thank you.

20 Give us your full name, please.

21 THE DEFENDANT: Steven Mark Simmons.

22 THE COURT: How old are you?

23 THE DEFENDANT: Forty-eight.

24 THE COURT: Are you a United States citizen?

25 THE DEFENDANT: I'm sorry?

1 THE COURT: Are you a United States citizen?

2 THE DEFENDANT: Yes, I am.

3 THE COURT: Did you graduate college?

4 THE DEFENDANT: Yes, ma'am.

5 THE COURT: Any graduate school?

6 THE DEFENDANT: No, ma'am.

7 THE COURT: When did you graduate college?

8 THE DEFENDANT: 1991.

9 THE COURT: With a bachelor's degree?

10 THE DEFENDANT: Yes, ma'am.

11 THE COURT: Have you recently or are you currently
12 under the care of a doctor, a psychiatrist, or a psychologist
13 for any reason?

14 THE DEFENDANT: No, ma'am.

15 THE COURT: Do you have any condition that affects
16 your ability to see or to hear?

17 THE DEFENDANT: No, ma'am.

18 THE COURT: Do you have any condition that affects
19 your ability to think or to understand or to make decisions on
20 your own behalf?

21 THE DEFENDANT: No, ma'am.

22 THE COURT: In the last 24 hours, have you taken any
23 drugs, medicine, or pills that affect your mental processes,
24 whether or not prescribed by a doctor?

25 THE DEFENDANT: No, ma'am.

1 THE COURT: In the last 24 hours, have you had any
2 alcoholic beverages?

3 THE DEFENDANT: No, ma'am.

4 THE COURT: Is your mind clear today?

5 THE DEFENDANT: Yes, ma'am.

6 THE COURT: Do you understand what is happening in
7 this proceeding?

8 THE DEFENDANT: Yes, ma'am.

9 THE COURT: Does either counsel have any objection to
10 the defendant's competence to plead today?

11 MR. QUIGLEY: No, your Honor.

12 MR. MIEDEL: No, your Honor.

13 THE COURT: Mr. Simmons, have you received a copy of
14 the superseding indictment? That's the document that contains
15 the charges against you.

16 THE DEFENDANT: Yes, ma'am.

17 THE COURT: Have you read it?

18 THE DEFENDANT: Yes, ma'am.

19 THE COURT: Do you want me to read it to you?

20 THE DEFENDANT: No, ma'am. Thank you.

21 THE COURT: Thank you.

22 Do you understand what it says you did?

23 THE DEFENDANT: Yes, ma'am.

24 THE COURT: Have you had time to talk to your attorney
25 about the charges and about how you wish to proceed?

1 THE DEFENDANT: Yes, ma'am.

2 THE COURT: Has your attorney told you the
3 consequences of pleading guilty?

4 THE DEFENDANT: Yes, ma'am.

5 THE COURT: Are you satisfied with your attorney's
6 representation of you so far?

7 THE DEFENDANT: Yes, ma'am.

8 THE COURT: I'm now going to explain certain
9 constitutional rights that you have. These are rights that you
10 will be giving up if you enter a guilty plea. Please listen
11 carefully to what I'm going to tell you. If you don't
12 understand something, stop me. And either your attorney or I
13 will explain the issue more fully.

14 Under the Constitution and laws of the United States,
15 you have a right to plead not guilty to all of the charges
16 against you.

17 Do you understand that?

18 THE DEFENDANT: Yes, ma'am.

19 THE COURT: If you plead not guilty, you'll be
20 entitled under the Constitution to a speedy and public trial by
21 jury of those charges. At trial you would be presumed
22 innocent.

23 The government would be required to prove you guilty
24 beyond a reasonable doubt before you could be found guilty.
25 You could not be convicted unless a jury of 12 people agreed

1 unanimously that you are guilty beyond a reasonable doubt.

2 Do you understand that?

3 THE DEFENDANT: Yes, ma'am.

4 THE COURT: If you went to trial, then at that trial
5 and at every stage of the case, you would have the right to be
6 represented by an attorney. If you could not afford one, an
7 attorney would be appointed to represent you at the
8 government's expense.

9 Even if you retained private defense counsel but then
10 ran out of money, an attorney would be appointed to continue to
11 represent you. You would be entitled to an attorney all the
12 way through trial, not just for a guilty plea. So your
13 decision to plead guilty should not depend on whether you can
14 afford a lawyer.

15 Do you understand that?

16 THE DEFENDANT: Yes, ma'am.

17 THE COURT: During trial, the witnesses for the
18 prosecution would have to come to court and testify in your
19 presence where you could see them and hear them and your lawyer
20 could cross-examine them.

21 If you wanted, your lawyer could offer evidence on
22 your behalf as well. You would be able to use the Court's
23 power, known as subpoena power, to compel witnesses to come to
24 court to testify even if they didn't want to come.

25 Do you understand that? Mr. Simmons?

1 THE DEFENDANT: Yes, ma'am.

2 THE COURT: If you were convicted at trial, you would
3 have the right to appeal that verdict to a higher court.

4 Do you understand that?

5 THE DEFENDANT: Yes, ma'am.

6 THE COURT: As I said before, you have the right to
7 plead not guilty. Even today, although you came to court for
8 the purpose of entering a guilty plea, you have the right to
9 change your mind, persist in your not guilty plea, and to
10 proceed to trial.

11 But if you do plead guilty and if the Court accepts
12 your plea, you will give up the right to a trial and the rights
13 that go with it that I just described to you. If you plead
14 guilty, there won't be any trial. All that will remain to be
15 done will be to impose a sentence.

16 Now, you and the government will be allowed to make
17 certain arguments about what sentence you should get, but there
18 won't be any trial to determine whether you are guilty or
19 not guilty of the charges to which you plead guilty.

20 Do you understand that?

21 THE DEFENDANT: Yes, ma'am.

22 THE COURT: Do you also understand that the decision
23 as to the appropriate sentence in your case would be entirely
24 up the to sentencing judge, not me, not the prosecutor, not
25 your lawyer, and that the sentencing judge will be limited only

1 by what the law requires?

2 THE DEFENDANT: I do.

3 THE COURT: That means that even if you are surprised
4 or disappointed by your sentence, you will still be bound by
5 your guilty plea, and you won't be able to take it back.

6 Do you understand that?

7 THE DEFENDANT: Yes, ma'am.

8 THE COURT: If you do plead guilty, you're also giving
9 up your right not to incriminate yourself, I'll ask you
10 questions about what you did in order to satisfy myself that
11 you're actually guilty, and you'll have to answer those
12 questions truthfully.

13 So, by pleading guilty, you will be admitting what
14 lawyers call your factual guilt as well as your legal guilt.

15 Do you understand that?

16 THE DEFENDANT: Yes, ma'am.

17 THE COURT: Count One of the superseding indictment
18 charges you with conspiring to commit securities fraud and wire
19 fraud in violation of Title 18 of the U.S. Code, Section 371.

20 I'm going to ask the assistant U.S. Attorney,
21 Mr. Quigley, to state the elements of the charge.

22 The elements, sir, are the things the government would
23 have to prove beyond a reasonable doubt if you went to trial.

24 Mr. Quigley.

25 MR. QUIGLEY: Thank you, your Honor.

With respect to the conspiracy charge, the government would have to prove four elements:

First, that two or more persons entered the unlawful agreement charged in the indictment; second, that the defendant knowingly and willfully became a member of the conspiracy; third, that at least one of the members of the conspiracy knowingly committed an overt act charged in the indictment; and fourth, that the overt act was committed to further some objective of the conspiracy.

With respect to the underlying offenses that are the object of the conspiracy, securities fraud and wire fraud, with respect to securities fraud, the government would have to prove that in connection with the purchase or sale of a security, the defendant or one of his coconspirators employed a device, scheme, or artifice to defraud or made an untrue statement of a material fact or made a statement of immaterial fact that made what was said under the circumstances misleading, or engaged in an act, practice, or course of business that operated or would operate as a fraud or deceit upon a purchaser or seller.

Second, that the defendant acted willfully and knowingly the with intent to defraud; and third, that the defendant or one of the coconspirators used or caused to be used any means or instrument of transportation or communication in interstate commerce with use of the mails. That's securities fraud.

With respect to wire fraud, there are three elements: First, there was a scheme or artifice to defraud or to obtain money or property; second, that the defendant knowingly and willfully participated in this scheme or artifice to defraud, that with knowledge of its fraudulent nature and specific intent to defraud; and third, that in the execution of the scheme, the defendant or one of his coconspirators used facilities in interstate commerce, interstate wires.

THE COURT: Is there a venue element as well?

MR. QUIGLEY: Yes, your Honor. The government would have to prove by a preponderance of the evidence that the overt act occurred in the Southern District of New York.

THE COURT: Thank you, Mr. Quigley.

Mr. Simmons, I'm now going to tell you the maximum possible penalty for the crime charged in Count One. The maximum means the most that could possibly be imposed. It does not mean that this is necessarily what you will receive, but by pleading guilty, you are exposing yourself to the possibility of receiving any punishment or combination of punishments up to the maximum that I'm about to describe.

Do you understand that?

THE DEFENDANT: Yes, ma'am.

THE COURT: The maximum term of imprisonment for the crime charged in Count One is five years, five years in prison, which could be followed by up to three years of supervised

1 release.

2 Supervised release means that after release from
3 prison, you would be subject to supervision by the probation
4 department. If you are placed on supervised release and
5 thereafter violated any condition of your supervised release,
6 the Court could revoke the term of supervised release
7 previously imposed and return you to prison without giving you
8 any credit for the time previously served on post-release
9 supervision.

10 In addition to these restrictions on your liberty, the
11 maximum possible punishment for the crime charged in Count One
12 includes financial penalties. The maximum allowable fine is
13 \$250,000 or twice the profits of the criminal activity or twice
14 what someone other than yourself lost because of the criminal
15 activity, whichever is greater.

16 You will also be required to pay restitution to any
17 victims of the crime in an amount that the Court decides is
18 required to compensate them for any injuries.

19 In addition, by pleading guilty, you will admit to the
20 forfeiture allegations in the indictment, and you will agree to
21 forfeit the sum of \$6.9 million, \$6,900,000, in U.S. currency,
22 which is deemed to be property within the scope of 18 U.S.
23 Code, Section 981(a)(1)(C) and 28 U.S. Code, Section 2461.

24 I am also required by law to tell you that there is an
25 additional special assessment of \$100 which is required to be

1 imposed on each count of conviction.

2 Now, you told me a moment ago that you are a U.S.
3 citizen. Nonetheless, I am required to tell you that if you
4 were not a U.S. citizen or if it should turn out that you are
5 not a U.S. citizen, your guilty plea could also have adverse
6 consequences for your ability to remain in or return to the
7 United States, including removal, deportation, denial of
8 citizenship, or denial of admission into the U.S. in the
9 future.

10 Your removal or deportation could be mandatory. If
11 that did happen, you would still be bound by your guilty plea.
12 You would not be able to withdraw it regardless of any advice
13 you received from your counsel or others regarding the
14 immigrations consequences of your plea.

15 Do you understand that?

16 THE DEFENDANT: Yes, ma'am.

17 THE COURT: I am told there is a written agreement
18 between you and the government which is being handed to me now.
19 It is dated October 2 of this year. It is addressed to your
20 lawyer, and it appears to have your signature on the last page,
21 which I am holding up.

22 THE DEFENDANT: Yes, ma'am.

23 THE COURT: Did you sign this plea agreement today?

24 THE DEFENDANT: Yes, ma'am.

25 THE COURT: Did you read it before you signed it?

1 THE DEFENDANT: Yes, ma'am.

2 THE COURT: Good.

3 Did you discuss it with your attorney?

4 THE DEFENDANT: Yes, ma'am.

5 THE COURT: Do you understand its terms?

6 THE DEFENDANT: Yes, ma'am.

7 THE COURT: Has anyone promised you or offered you
8 anything in order to get you to plead guilty, other than what
9 is in your written plea agreement?

10 THE DEFENDANT: No, ma'am.

11 THE COURT: It appears that you and the government
12 have reached agreement regarding the appropriate calculation of
13 your sentence based on a part of our law known as the
14 sentencing guidelines.

15 And it says on page 2 of your plea agreement that the
16 appropriate guideline sentencing range for you is from 37 to 46
17 months, 37 to 46 months' imprisonment, and that the appropriate
18 monetary fine range is from \$15,000 to \$150,000.

19 Under this agreement, sir, neither you nor the
20 government is allowed to argue to the sentencing judge for a
21 calculation which is different from the one in the agreement.

22 Do you understand that?

23 THE DEFENDANT: Yes, your Honor.

24 THE COURT: Do you also understand that in this
25 agreement you have also limited your right to appeal in certain

1 respects from any sentence that may be imposed?

2 Specifically, do you understand that as long as the
3 district judge sentences you to a prison term of no longer than
4 46 months, any lawful sentence of supervised release, and a
5 fine no greater than \$150,000, you are giving up your right to
6 challenge your sentence, whether by direct appeal, writ of
7 habeas corpus, or otherwise?

8 THE DEFENDANT: Yes, your Honor.

9 THE COURT: Do you understand that under the terms of
10 your plea agreement, even if you later learned the government
11 withheld from your counsel certain information that would have
12 been helpful to you in defending yourself at trial, you would
13 not be able to complain about that or withdraw your plea?

14 THE DEFENDANT: May I just --

15 THE COURT: Take a moment.

16 THE DEFENDANT: Thank you.

17 (Pause)

18 THE DEFENDANT: Okay, your Honor. Thank you.

19 THE COURT: Do you understand what I just told you?

20 THE DEFENDANT: Yes.

21 THE COURT: Do you also understand that the terms of
22 your plea agreement, including any recommendation or
23 calculation relating to your sentence, are not binding on the
24 sentencing judge?

25 THE DEFENDANT: Yes, your Honor.

1 THE COURT: The sentencing judge can reject those
2 recommendations or calculations and could impose a more severe
3 sentence than you expect without permitting you to withdraw
4 your plea of guilty.

5 The sentencing judge is required to make their own
6 independent calculation of the appropriate sentencing range
7 under the guidelines, and she will also have the discretion to
8 give you a sentence above or below that range. If she goes
9 above, she can go up to the maximum sentence that I told you
10 about earlier.

11 In addition to the guidelines and possible departures
12 from the guidelines, the sentencing judge will also consider
13 all of the factors set forth at 18 U.S. Code, Section 3553(a).
14 In other words, she will pronounce whatever sentence she
15 believes is the appropriate sentence for you, even if it's
16 different from the one set forth in your plea agreement.

17 Do you understand that?

18 THE DEFENDANT: Yes, ma'am.

19 THE COURT: The Court will also consider a presentence
20 report prepared by the probation department in advance of your
21 sentencing. You and the government will have an opportunity
22 ahead of sentencing to challenge the facts which are reported
23 by the probation officer.

24 Do you understand there is no parole in the federal
25 system?

1 (Pause)

2 THE DEFENDANT: Yes, your Honor.

3 THE COURT: You understand that now.

4 THE DEFENDANT: Yes.

5 THE COURT: If you are sentenced to prison, you will
6 not be released on parole.

7 Before I go on, let me ask counsel for the government
8 and defense counsel if there are any other provisions of the
9 plea agreement you'd like me to go over with Mr. Simmons.

10 MR. QUIGLEY: No, your Honor.

11 MR. MIEDEL: Your Honor, just to be clear, while the
12 parties have stipulated to the guideline range calculation,
13 either party under the terms of the agreement is permitted to
14 seek a sentence outside of that range.

15 THE COURT: Under 18 U.S. Code, Section 3553(a).

16 MR. MIEDEL: Correct.

17 THE COURT: Correct.

18 Anything further?

19 MR. MIEDEL: No.

20 THE COURT: One last time, Mr. Simmons, because this
21 is an important question, other than what is in the plea
22 agreement itself, have any promises been made to influence you
23 to plead guilty?

24 THE DEFENDANT: No, ma'am.

25 THE COURT: Have any promises been made concerning the

1 actual sentence that you will receive?

2 THE DEFENDANT: No, ma'am.

3 THE COURT: Now that you have been advised of the
4 charges against you, the possible penalties that you face, and
5 the rights that you are giving up, is it still your intention
6 to plead guilty to Count One of the superseding indictment?

7 THE DEFENDANT: Yes, your Honor.

8 THE COURT: Is your plea voluntary and made of your
9 own free will?

10 THE DEFENDANT: Yes, your Honor.

11 THE COURT: Mr. Simmons, with respect to Count One,
12 how do you plead? Guilty or not guilty?

13 THE DEFENDANT: Guilty, your Honor.

14 THE COURT: Please tell me in your own words what you
15 did that makes you guilty of the crime charged in Count One.

16 THE DEFENDANT: In 2016 in the Southern District of
17 New York, I agreed with another person to commit a fraud.
18 Specifically, I, along with another person, told investors that
19 their money would be invested without it being commingled with
20 other peoples' capital, which wasn't true. I made other
21 representations that were not true.

22 I misused the investors' funds for personal purposes
23 without her knowledge. Some of my conversations took place
24 over the phone or by email. I do recognize that I failed to
25 protect my client, and what I did was wrong.

1 THE COURT: Thank you, Mr. Simmons.

2 Did your attorney help you prepare the testimony that
3 you just gave?

4 THE DEFENDANT: Yes. He made it a lot more clear.
5 I'm sorry.

6 THE COURT: That's fine.

7 Do you adopt those words as your own?

8 THE DEFENDANT: Yes, your Honor.

9 THE COURT: Is everything you just told me true?

10 THE DEFENDANT: Yes, your Honor.

11 THE COURT: Did you know at the time you did those
12 acts that what you were doing was wrong?

13 THE DEFENDANT: Yes, your Honor.

14 THE COURT: Mr. Quigley, do you believe that is a
15 sufficient factual predicate for a guilty plea?

16 MR. QUIGLEY: Yes, your Honor.

17 THE COURT: Would you like me to ask the defendant any
18 further questions?

19 MR. QUIGLEY: No, your Honor.

20 THE COURT: Does the government represent that it has
21 sufficient evidence to establish guilt beyond a reasonable
22 doubt at trial, and would you like to make a proffer?

23 MR. QUIGLEY: Yes, your Honor. The government's
24 evidence would include emails between or involving the
25 defendant and his coconspirators and victims of the fraud;

testimonial evidence from victims of the fraud and potentially a cooperating witness; and other documentary evidence, including bank records showing the movement of funds from investors and among the defendants.

THE COURT: Thank you.

Mr. Simmons, on the basis of your responses to my questions and my observations of your demeanor, I find that you are competent to enter a guilty plea. I am satisfied that you understand your rights, including your right to go to trial; that you are aware of the consequences of your plea, including the sentence that may be imposed; that you are voluntarily pleading guilty; and that you have admitted that you are guilty as charged in Count One of the superseding indictment. For these reasons, I will recommend that the district judge accept your plea.

I will ask the government to order a copy of the transcript and submit it to Judge Woods together with any additional paperwork so that she can act on my recommendation.

Has she set a sentencing date?

MR. QUIGLEY: She has not, your Honor. We request a control date three months out, maybe January 31.

THE COURT: The defendant is not in custody; correct?

MR. QUIGLEY: He is not.

THE COURT: Is there a reason that you need three months? We ordinarily give a six-month control date for a

1 defendant who is not in custody.

2 MR. MIEDEL: Did you say six?

3 MR. QUIGLEY: We can just write the judge and ask for
4 a date.

5 THE COURT: Whichever you want.

6 MR. QUIGLEY: When we ask her to accept the plea,
7 we'll ask her to set a sentencing date.

8 THE COURT: We'll set a control date for January.
9 January 29 will be the control date.

10 MR. QUIGLEY: Thank you, your Honor.

11 THE COURT: I will direct that a presentence report be
12 prepared.

13 Can you deliver the case summary, Mr. Quigley, within
14 the next two weeks for purposes of the presentence report?

15 MR. QUIGLEY: Yes, your Honor.

16 THE COURT: Mr. Miedel, will you be available with
17 your client for interview by the probation department within
18 the next two weeks?

19 MR. MIEDEL: Yes.

20 THE COURT: Thank you.

21 I don't know what the bail terms are, but are there
22 any objections to continuing them?

23 MR. QUIGLEY: No, your Honor.

24 THE COURT: So, Mr. Simmons, all of the conditions on
25 which you are released up until now continue to apply, and as

1 I'm sure you understand, a violation of any of those conditions
2 can have serious consequences, including revocation of bail or
3 prosecution for bail jumping.

4 Do you understand that?

5 THE DEFENDANT: Yes, ma'am. I do.

6 THE COURT: Anything further from the government?

7 MR. QUIGLEY: No, your Honor. Thank you.

8 THE COURT: Anything further from the defense?

9 MR. MIEDEL: No, your Honor. Thank you.

10 THE COURT: Thank you, gentlemen.

11 (Adjourned)

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